

UNITED STATES OF AMERICA  
MERIT SYSTEMS PROTECTION BOARD

RONALD D. MARSHALL,  
Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,  
Agency.

DOCKET NUMBER  
CH34438910593

DATE: MAR 05 1990

Lee Hornberger, Esquire, Cincinnati, Ohio, for the  
appellant.

George Bauer, Esquire, Cleveland, Ohio, for the agency.

BEFORE

Daniel R. Levinson, Chairman  
Maria L. Johnson, Vice Chairman

OPINION AND ORDER

The appellant petitions for review of the initial decision issued on August 29, 1989, that dismissed his appeal for lack of jurisdiction. For the reasons discussed below, we find that the petition does not meet the criteria for review set forth at 5 C.F.R. § 1201.115, and we therefore DENY it. We REOPEN this case on our own motion under 5 C.F.R. § 1201.117, however, and AFFIRM the initial decision as MODIFIED by this Opinion and Order, still DISMISSING this appeal for lack of jurisdiction.

### BACKGROUND

The agency reassigned the appellant from the position of Supervisory Firefighter, GS-6, to the nonsupervisory position of Motor Vehicle Operator, WG-7, at an increase in his annual base salary, effective July 2, 1989, and imposed a 14-day suspension based on charges that he had abused his supervisory authority. See Initial Appeal File (IAF), Tab 5, Subtab 4h. Initially, the agency proposed to remove the appellant for his alleged misconduct, but by letter dated June 2, 1989, it rescinded the proposal to remove him and instead proposed a 30-day suspension and reassignment from his supervisory position. See IAF, Tab 5, Subtabs 4af and 4k. The deciding official subsequently reduced the suspension to 14 days, to be served during the period of September 17, 1989, to and including September 30, 1989, and reassigned him from his position. IAF, Tab 5, Subtab 4h.

The appellant filed a grievance concerning the agency's action. He also filed a complaint with the Office of Special Counsel (OSC) in which he alleged that the agency took its action in reprisal for his protected activity of filing complaints of safety violations with the Occupational Safety and Health Administration (OSHA). After inquiring into the matter, the Special Counsel declined to take further action on the appellant's complaint. The appellant then filed a petition for appeal with the Board's Chicago Regional Office under the Whistleblower Protection Act (hereinafter the Act),

Pub. L. No. 101-12, 103 Stat. 16, 34 (1989). IAF, Tab 5, Subtabs 4d and 4e; IAF, Tab 1.

The administrative judge issued an acknowledgment order informing the appellant that there was a question regarding the Board's jurisdiction over his appeal because the Act's savings clause precluded the Act's application to agency administrative actions pending at the time of its enactment. IAF, Tab 2 at 2. The appellant's response to the administrative judge's acknowledgment order consisted of a copy of the undated proposal to reassign him from a supervisory position and to impose a 30-day suspension. IAF, Tab 4. In addition, the appellant submitted a statement to the effect that the disciplinary action that is the subject of this appeal commenced with that proposal notice on June 2, 1989. *Id.*

The agency responded to the acknowledgment order and stated that the Act did not authorize the Board's jurisdiction over this appeal even though the Special Counsel had rejected the appellant's complaint after the Act's effective date. IAF, Tab 3. The agency subsequently requested the Board to dismiss the appeal for lack of jurisdiction on the ground that the appellant had filed his grievance before pursuing his appeal to the Board and therefore had elected the grievance procedure. The agency also asserted that the Board lacked jurisdiction because of the savings provisions of the Act. IAF, Tab 5, Subtab 1.

In her initial decision, the administrative judge dismissed the appeal for lack of jurisdiction and denied the appellant's request for a hearing because she found that there were no jurisdictional facts in dispute. Initial Decision (I.D.) at 1. In addressing the jurisdictional question, the administrative judge considered the Act's savings provision and found that it was similar to the savings provision of the Civil Service Reform Act (CSRA). I.D. at 2. She cited Board cases construing the CSRA and found that, under the Board's precedent, an agency proceeding was considered to exist once the employee had received notice of the proposed action. *Id.* Because the appellant received notice of the proposed action on June 2, 1989, prior to the effective date of the Act, which was July 9, 1989, the administrative judge found that the action against the appellant was pending before the effective date of the Act and that the Board therefore lacked jurisdiction over the appeal. *Id.* at 3. The administrative judge further found that the appellant had not shown that any other law, rule, or regulation established the Board's jurisdiction over the actions complained of in his appeal. *Id.*

The appellant petitions for review, alleging that the initial decision should be reversed and his request for a hearing granted because the effective date of his suspension occurred after the effective date of the Act. The agency has responded in opposition to the petition for review, alleging that the appellant has raised no error by the administrative

judge in either her findings of fact or her application of the law.

### ANALYSIS

The savings provisions of the Whistleblower Protection Act state, in relevant part:

No provision of this Act shall affect any administrative proceeding pending at the time such provisions take effect. Orders shall be issued in such proceedings and appeals shall be taken therefrom, as if this Act had not been enacted.

Pub. L. No. 101-12, § 7(b), 103 Stat. 16, 34 (1989). The Board has now issued its regulations interpreting the savings provisions of the Act. 54 Fed. Reg. 53,500, 53,522 (1989) (to be codified at 5 C.F.R. § 1210.191(b)). With regard to administrative proceedings and appeals, the Board's regulation states:

"Pending" is considered to encompass existing agency proceedings, including personnel actions that were proposed, threatened, or taken before July 9, 1989, the effective date of the Whistleblower Protection Act of 1989, and appeals before the Board or its predecessor agencies that were subject to judicial review on that date. An agency proceeding is considered to exist once the employee has received notice of the proposed action.

*Id.* (to be codified at 5 C.F.R. § 1201.191(b)(2)).

This regulation is consistent with the Board's previous interpretation of the savings provisions of the CSRA, Pub. L. No. 95-454, § 902(b), 92 Stat. 1111, 1224 (1978), which state, in relevant part:

No provision of this Act shall affect any administrative proceedings pending at the time such provision takes effect. Orders shall be issued in such proceedings and appeals shall be taken therefrom as if this Act had not been enacted.

The Board has interpreted the CSRA savings provision by considering an agency proceeding to exist once the employee has received notice of the proposed action. *E.g.*, 5 C.F.R. § 1201.191(b) (1988);<sup>1</sup> *Russell v. Department of the Navy*, 6 M.S.P.R. 698, 702 (1981); *Hein v. Office of Personnel Management*, 1 M.S.P.R. 410, 413-14 (1980).

Because the savings provisions of the statute at issue in this case use the same language that was used in the savings provisions of the CSRA, we find that the two savings clauses should be interpreted in the same manner. See *Lorillard v. Pons*, 434 U.S. 575, 581 (1978) (where Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute).<sup>2</sup> We therefore find, consistently with our

<sup>1</sup> We note that, under the Board's final regulations implementing the Act at 54 Fed. Reg. 53,500, 53,522 (1989), the Board's regulation concerning the savings provisions of the Civil Service Reform Act is to be recodified at 5 C.F.R. § 1201.191(a).

<sup>2</sup> The Board has also given a similar interpretation to the savings clause of the Act of August 18, 1987, Pub. L. No. 100-90, § (b)(2), 101 Stat. 673 (1987). That Act, which conferred appeal rights on certain supervisory and managerial employees of the United States Postal Service, included the following savings clause:

An action which is commenced ... before the effective date of the amendment ... shall not abate by reason of the enactment of this Act.

*Id.* The Board has interpreted this clause as excluding an adverse action in which the employee received the proposal notice before the effective date of the amendment mentioned in the clause. *Wolff v. United States Postal Service*, 37 M.S.P.R. 599, 601-02 (1988).

regulations and interpretation of previous savings provisions, that an action is "pending" as of the date an employee receives notice of the proposed agency action.

In this case, the appellant received the notice of proposed suspension on June 2, 1989, prior to the effective date of the Whistleblower Protection Act. Accordingly, this action was pending prior to the time the Act took effect and, pursuant to the Act's savings provision, is not within the Board's jurisdiction. See 54 Fed. Reg. 53,500, 53,522 (1989) (to be codified at 5 C.F.R. § 1201.191(b)(2)).

#### ORDER

This is the final order of the Merit Systems Protection Board in this appeal. See 5 C.F.R. § 1201.113(c).

#### NOTICE TO APPELLANT

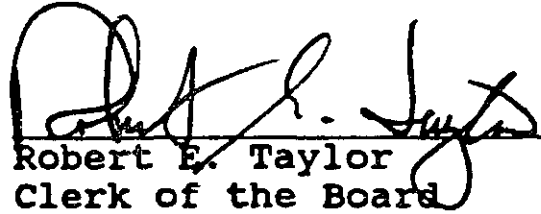
You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. See 5 U.S.C. § 7703(a)(1). You must submit your request to the court at the following address:

United States Court of Appeals  
for the Federal Circuit  
717 Madison Place, N.W.  
Washington, DC 20439

The court must receive your request for review no later than

30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. See 5 U.S.C. § 7703(b)(1).

FOR THE BOARD:



Robert E. Taylor  
Clerk of the Board

Washington, D.C.